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Cover Page Footnote

International Law; Commercial Law; Law

COMMENT

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I. Introduction

The European Community's Single Market was intended to break down barriers between countries and open frontiers to those within its bounds.¹ For a majority of the consumers throughout the Union, this goal has not been realized due to the inadequacy of consumer protection measures. Information about consumer rights is often nonexistent and applicable national laws are complex, leaving many consumers in the dark regarding their rights against vendors.² Without a Community document governing the application of product guarantees, consumers who purchase abroad are required to interpret the national law of each country they deal with to determine any potential rights or remedies that may be available.³

This situation prompted Jim Murray, the head of the European Consumers' Organization, to comment that "[p]aralyzed as it is at present, the Community has nothing to offer consumers."⁴ The legal guarantee provided by each Member State to govern consumer goods is the "bedrock" of consumer rights with regard

¹ See Commission Proposal for a European Parliament and Council Directive on the Sale of Consumer Goods and Associated Guarantees, COM(95)520 final at 1 [hereinafter Proposal for a Directive].

² See generally Alasdair R. Young, *Towards a More Vigorous European Consumer Policy?*, 7 EUR. BUS. J. 34 n.4 (1995) (arguing that leeway given to Member States to formulate their own consumer protection policies has led to disparate measures being adopted within the European Union).

³ See Commission Green Paper on Guarantees for Consumer Goods and After-Sales Services, COM(93)509 final at 59 [hereinafter Green Paper]. See *infra* notes 80-172 and accompanying text.

⁴ BEUC: *Community Consumer Policy in a State of Paralysis*, EUR. REP., Apr. 24, 1993, available in LEXIS, Nexis Library, Eurnws File.

to "the quality and conformity of the goods purchased."⁵ However, all too often the consumer has no way of knowing which legal guarantee covers the purchase and what rights, if any, are attained along with the product.⁶ Unfortunately, it often happens that "there is little chance of redress for anyone buying goods or services abroad if they later turn out to be faulty."⁷

Statistics compiled by the United Kingdom's Office of Fair Trading for the year 1992 demonstrated the glaring need for a measure concerning guarantees and after-sales service.⁸ According to the survey, twenty-four percent of consumers who attempted to invoke the commercial guarantees offered by vendors or producers experienced difficulties and did not receive sufficient satisfaction regarding their complaints.⁹ These problems were intensified when the dealing occurred on a transnational level. A 1991 Eurobarometer survey revealed that fifty-three percent of consumers feared the difficulties encountered when seeking to exchange or have repaired products initially purchased in a different country.¹⁰ Furthermore, a study conducted by the Commission stated that of the complaints received by national institutions regarding transfrontier transactions, between fifty and seventy-five percent dealt with defective products and between ten and seventy-five percent dealt with commercial guarantees.¹¹

Cross-border transactions are especially problematic to the consumer due to problems concerning the applicable law, differences between national laws, and difficulties involved in actually invoking the commercial guarantee.¹² The impact of these

⁵ Proposal for a Directive, *supra* note 1, at 3.

⁶ *See id.* The legal guarantee is created by the law of the country and is also the foundation for the commercial guarantee, which is offered by the professional. *See id.*

⁷ Anthony Barnett, *Cross-Channel Caveats*, GUARDIAN (London), Jan. 22, 1995, at 12, available in 1995 WL 7576059. Consumers are regularly told to "put it down to experience," due to the cost and complication of pursuing any relief. *See id.*

⁸ Green Paper, *supra* note 3, at 8.

⁹ *See id.* The complaints ranged from a high of 47% percent in the furniture and carpet industries to a low of 14% in the washing machine and dryer industry. *See id.*

¹⁰ *See id.*

¹¹ *See id.* at 9.

¹² *See* Proposal for a Directive, *supra* note 1, at 3-4.

problems is significant because "consumers who have had trouble with cross-border transactions will be reluctant to repeat the experience and will tend to be skeptical about the process of European integration and the true significance of the Single Market."¹³ The Commission concluded that measures are needed to protect the consumer because, "in order for the internal market to work properly, it is necessary for guarantees concerning products purchased by consumers in another country to be honored without discrimination in the consumers' country of residence."¹⁴

This Comment will outline the recent developments in European consumer policy and the measures that will allegedly solve the problems faced by consumers in cross-border transactions. Section II traces the early history of consumer protection and the birth of the movement toward regulating consumer guarantees.¹⁵ Section III presents a breakdown of the law currently faced by consumers who engage in cross-border transactions with respect to both the legal and commercial guarantee.¹⁶ The Proposal for a Directive is presented in section IV, with a description of its provisions and effects.¹⁷ Section V contains an analysis of the Proposal for a Directive regarding both the solutions originally presented in the Green Paper and the need to respond to complaints made by consumers.¹⁸ Finally, section VI is a conclusion that wraps up the material, contemplates the effect of the legislation on consumers, and looks to the future of cross-border transactions as affected by the proposed Directive.

¹³ Green Paper, *supra* note 3, at 9.

¹⁴ *Id.* at 8. The Commission has the exclusive right to propose Community Acts. See T.C. HARTLEY, THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW 11 (1994). The group consists of 17 members, two each from Germany, France, Italy, Spain, and the United Kingdom and one each from the rest of the Member States. See *id.* at 11. The Council consists of representatives from the Member States and its task is to vote on the proposals of the Commission. See *id.* at 17. Finally, "the European Parliament is intended to represent the people of the Community." *Id.* at 27. The role of the Parliament is limited to rendering its opinion on legislation and suggesting amendments. See *id.* The Commission and the Council, however, are under no obligation to adhere to the opinion. See *id.* at 33.

¹⁵ See *infra* notes 19-79 and accompanying text.

¹⁶ See *infra* notes 80-174 and accompanying text.

¹⁷ See *infra* notes 175-219 and accompanying text.

¹⁸ See *infra* notes 220-87 and accompanying text.

II. The Consumer Protection Dilemma

A. Early History

Although the first consumer program was enacted in 1975, since then consumer policy has developed slowly in the European Community (EC).¹⁹ Despite the implementation of further programs, it was not until the last decade that any significant progress occurred. A large part of the early struggle was a result of the economic recession of the 1970s and early 1980s, and an unwillingness by Member States to place further burdens on a struggling European economy.²⁰ A requirement that proposed measures receive a unanimous vote in order to be adopted on the EC level often led to the considerable dilution of provisions after each Member State had demanded and received some concession or another.²¹ Furthermore, all measures were required to facilitate the establishment of the Single Market and consumer protection was not generally perceived as being an essential step towards that ultimate goal.²² Finally, several Member States simply rejected outright the idea that consumer policy was a legitimate concern of the EC.²³

The interests of most countries centered on the free movement of goods, while the protection of consumers took a back seat.²⁴ The "substantial influence of industrial lobbies, bolstered by the political imperative to reduce unemployment also impeded the development of a strong EC consumer policy."²⁵ The ambivalence of Member governments toward consumer policy was spearheaded

¹⁹ See Three Year Action Plan of Consumer Policy in the EEC (1990-1992), COM(90)98 final 1, 1 [hereinafter First Action Plan].

²⁰ See Young, *supra* note 2, at 34.

²¹ See Opinion on Consumer Protection and Completion of the Internal Market, 1991 O.J. (C 339) at 17 [hereinafter Opinion on Consumer Protection].

²² See Rebecca Evans, *Time for Action: EU Consumer Policy*, 4 CONSUMER POL'Y REV. 18, 18 (1994). The EEC Treaty mentioned consumer protection only in connection with the goal of removing trade barriers. See Hans W. Micklitz & Stephen Weatherill, *Consumer Policy in the European Community*, 16 J. CONSUMER POL'Y 285, 292 (1993).

²³ See Young, *supra* note 2, at 34.

²⁴ See *id.*

²⁵ *Id.*

by the Member States with the most influence, such as the United Kingdom and Germany, who were reluctant to push for consumer protection on the Community level because they generally considered it a matter best dealt with at the national level.²⁶

The lack of representation of consumer interests was also an obstacle to enacting meaningful community-wide protection. As a general rule, consumer organizations often suffer from a lack of resources, little influence, and minimal coordination of efforts among different groups.²⁷ Among the Member States of the EC, representation of consumer interests was divided among four major organizations that tended to disagree on the appropriate direction of consumer policy.²⁸ Their inability to coordinate efforts left them bickering amongst themselves rather than working toward any common goal.²⁹ Exacerbating the situation, the financial landscape of these organizations left them no choice but to rely on often inadequate public funding. On the other hand, business interests with deep pockets were able to exert great influence over the political leaders whose approval was necessary to adopt any new measure.³⁰

Weak institutional representation within the Community was another excuse for poor consumer policy, although some strides have been taken in the last decade to rectify that situation. Since the 1970s, Community institutions "took a number of timid steps towards recognition of the Community dimension of consumer

²⁶ See *id.* The Belgian and Danish governments strongly advocated the strengthening of the European Community consumer policy mainly due to their "social democratic traditions." See *id.* These countries maintain strict consumer standards; therefore, it is in their best interest to raise the level of Community standards to prevent their citizens from being at a competitive disadvantage. Due to their small size, however, these countries have been unable to wield any significant influence. See *id.*

²⁷ See *id.* at 36.

²⁸ See *id.* The European Consumer's Organization (BEUC), the Confederation of Family Organizations in the European Community (COFACE), the European Trade Union Confederation (EURO-C), and the European Community of Consumer Cooperatives (EURO COOP) are the four consumer organizations. According to Young, these organizations "do not coordinate their efforts effectively, nor do they divide responsibility for various consumer issues in a way which would allow them to make better use of their limited resources." *Id.* at 37.

²⁹ See *id.*

³⁰ See *id.*

policy.”³¹ Progress was made as directives dealing with product liability,³² misleading advertising,³³ and labeling and advertising of foodstuffs³⁴ were implemented throughout the Union. Although directives took longer to draft than expected and often fell short of the expectations of consumer organizations, it was a sign of progress for consumers.³⁵

In response to growing demands, the Commission of the European Communities established the Consumer Policy Service whose purpose was to deal exclusively with issues regarding consumer interests. Poorly funded and staffed, the Consumer Policy Service was often overwhelmed by the tasks it was asked to undertake.³⁶ The Commission also instituted the Consumer's Consultative Council that coordinated the four major European consumer organizations.³⁷ Despite initial optimism, this project also failed to make any significant impact on consumer protection.³⁸ The European Parliament and the Economic and

³¹ Opinion on Consumer Protection, *supra* note 21, at 17.

³² See Council Directive 85/374/EEC on Product Liability, 1985 O.J. (L 210) 29. See *infra* notes 121-24 and accompanying text.

³³ See Council Directive 84/450 on Misleading Advertising, 1984 O.J. (L 250) 17. See *infra* notes 133-36 and accompanying text.

³⁴ See Council Directive 79/112 on the Labeling and Advertising of Foodstuffs, 1979 O.J. (L 33) 1, as amended by Council Directive 83/463, 1983 O.J. (L 255) 1; Council Directive 89/395, 1989 O.J. (L 186) 17 (establishing minimum labeling and advertising requirements for EC foodstuffs).

³⁵ See Opinion on Consumer Protection, *supra* note 21, at 17. The Economic and Social Committee recognized the need to have a social consumer policy if the Single Market was to be a success. These decisions could no longer be taken care of at the national level. The Committee felt it was “difficult to understand why consumers do not enjoy at Community level the same protection which they enjoy under national laws in some Member States.” *Id.* at 18. The problem of watered down initiatives plagued the Community and prevented the consumer from realizing maximum protection. See Monique Goyens, *Where There's a Will, There's a Way! A Practitioner's View*, 16 J. CONSUMER POL'Y 375, 378 (1993).

³⁶ See Opinion on Consumer Protection, *supra* note 21, at 20. According to data in 1991, the Commission allocated 0.018% of its total budget to consumer policy. See *id.* The consumer policy budget of the Community was 0.07% of the total Community budget. See Monique Goyens, *Consumer Protection in a Single European Market: What Challenge for the EC Agenda?*, 29 COMMON MKT. L. REV. 71, 92 (1992).

³⁷ See Opinion on Consumer Protection, *supra* note 21, at 20.

³⁸ See Young, *supra* note 2, at 37. The CCC was effectively paralyzed by the

Social Committee also created their own respective committees in an attempt to deal with growing consumer issues.³⁹

B. Optimistic Changes

In the mid-1980s, the Single Market Programme and the Single European Act rejuvenated the European integration and helped boost consumer policy. While the renewed energy was concentrated in areas relevant to free circulation of goods and services, consumers' economic and legal rights began to figure into those measures as well.⁴⁰ It became apparent that the ideal of free movement of goods would be a hollow goal if consumers did not believe that their economic rights would be protected when purchasing abroad.⁴¹ The Single European Act introduced significant legislative procedures that paved the way for improving consumer protection. Article 100A of the Single European Act declared that future measures would only require the approval of the majority of Member States, rather than a unanimous vote, in order to be adopted.⁴² Furthermore, Article 129A of the Maastricht Treaty enabled consumer policy at the EC level to be considered independent of any other common policy.⁴³ Many observers believed that this measure "liberate[d] [the] pursuit of the consumer interest from the constraints of enforced linkage to

continuing clashes between the organizations. It also lacked resources and was not consulted on many matters by the Commission. See Opinion on Consumer Protection, *supra* note 21, at 21; see also Goyens, *supra* note 35, at 380. But see Lothar Maier, *Institutional Consumer Representation in the European Community*, 16 J. CONSUMER POL'Y 355, 368. (1993). Despite continuing internal problems within the organization, CCC proposals for alterations in drafts were taken over by the Commission, in some form, in 30% of all cases. See *id.*

³⁹ See Opinion on Consumer Protection, *supra* note 21, at 21. Providing accurate information to the consumers became the principal goal of these organizations that believed that this was the easiest way to eliminate many of the problems faced by purchasers. See *id.*

⁴⁰ See Young, *supra* note 2, at 35.

⁴¹ See *id.*

⁴² See Micklitz & Weatherill, *supra* note 22, at 295. This provision was "seen as essential in order to ensure the adoption of the package of controversial legislation necessary to remove internal borders." *Id.*

⁴³ See Goyens, *supra* note 35, at 378. The Consumer Protection Title stated that "[t]he Community shall contribute to the attainment of a high level of consumer protection." Micklitz & Weatherill, *supra* note 22, at 298.

internal market policy.”⁴⁴

In 1990, the Commission announced that it would undertake a three-year action plan concerning consumer policy.⁴⁵ Because the 1992 integration was approaching, the action plan was undertaken in response to a Council of Ministers request to “intensify the activity addressed to the consumer.”⁴⁶ While the internal market was intended to benefit the consumer, the consumer had to be “confident to use the opportunities provided” in order to reap those benefits.⁴⁷ Despite this avowed desire to encourage consumer confidence, the Commission limited its proposals “to those areas where involvement [was] essential to the success of the Internal Market,” and placed a great deal of responsibility on the Member States because it felt it was “unrealistic to undertake such tasks continuously at a Community level.”⁴⁸

Four “areas of focus” were identified as being essential in order to build up consumer confidence in the internal market: consumer representation, consumer information, consumer safety, and consumer transactions.⁴⁹ First, the Commission compelled the consumer organizations to put aside their differences so that public trust in these agencies could flourish.⁵⁰ Second, making adequate consumer information available regarding products, rights, obligations and regulations was identified as a major step towards instilling confidence in the consumer.⁵¹ Finally, the action plan’s

⁴⁴ Micklitz & Weatherill, *supra* note 22, at 299. But see Andreas P. Reindl, *Symposium: Consumer Protection and the Uniform Commercial Code: Consumer Contracts and European Community Law*, 75 WASH. U.L.Q. 627, 641 (1997) (“Article 129A is unlikely to expand the Community’s ability and willingness to adopt legislative measures.”) The “decisive factor” is the political commitment on the part of both the Community institutions and Member States to adopt such measures. See *id.*

⁴⁵ See First Action Plan, *supra* note 19, at 1.

⁴⁶ *Id.* at 2.

⁴⁷ *Id.* Consumer confidence in products was essential to the success of the internal market. See Goyens, *supra* note 36, at 73.

⁴⁸ First Action Plan, *supra* note 19, at 15.

⁴⁹ *Id.* at 5.

⁵⁰ See *id.* at 6. Solid consumer representation was needed to match the strong influence of producers and suppliers. Without more influence and leverage, consumer policies would continue to be weak and one-sided. See Goyens, *supra* note 36, at 77.

⁵¹ See First Action Plan, *supra* note 19, at 7-9. Disclosure or transparency was a

goal was to "identify the elements in the existing contract laws of Member States which are likely to inhibit consumer purchases and as far as possible eliminate them."⁵² This objective naturally led to the "examination of possible initiatives to simplify cross frontier consumer contracts, guarantees, and after-sales service."⁵³

C. Awareness of Guarantee Problems

Although problems surrounding the law of guarantees were not new to consumers, little action had been taken towards developing any solutions.⁵⁴ As early as 1981, the second EEC program for a consumer protection and information policy requested that the Commission "study the possibilities of improving the quality of after-sales service provided by producers and suppliers of products and services, as well as by firms carrying out maintenance and repairs, notably as regards the guarantee period, transport costs, out-of service costs, and the availability of replacement parts."⁵⁵ In a 1986 Council Resolution, the Commission reported on the difficulties encountered by consumers when invoking guarantees on products purchased in other Member States.⁵⁶ The Commission promised to study these problems and come forward with an appropriate solution.⁵⁷ The European Parliament also called on the

necessity in order for the consumer to gain access to attain the relevant information needed to make sophisticated choices. See Goyens, *supra* note 36, at 80-81.

⁵² First Action Plan, *supra* note 19, at 15. The Commission proposed creating a "model set of contract conditions" in addition to the modification of existing law. *Id.*

⁵³ *Id.* at 19.

⁵⁴ See Alan Wilson, *Faulty Goods, Faulty law*, 5 CONSUMER POL'Y REV. 135 (1995). "The right of consumers to insist on goods that meet a reasonable standard of quality has long been in a confused state . . ." *Id.*

⁵⁵ Green Paper, *supra* note 3, at 10. A legal guarantee is defined as "the traditional protection that derives directly from the law and is present in all the national legal orders and according to which the vendor (or some other person) is held liable vis-à-vis the buyer for defects in the products sold." *Id.* A commercial guarantee refers to "the additional features which are offered, optionally, by the producer, vendor or any other person in the product distribution chain." *Id.* The effects of a legal guarantee and the conditions for invoking it are established by law, while the terms of the commercial guarantee are determined by the party offering it. See *id.* at 6.

⁵⁶ See Council Resolution Concerning the Future Orientation of the Policy of the European Economic Community for the Protection and Promotion of Consumer Interest, 1986 O.J. (C 167) 1, 1.

⁵⁷ See *id.* at 2.

Commission to "review the laws of the various States on guarantee schemes and to propose schemes that will ensure a minimum European standard but to retain contractual guarantees that go further than this as a special form of competition and not to regulate them in European laws."⁵⁸ The Economic and Social Committee claimed that in the area of guarantees, especially those involved with transfrontier purchases, the "reality experienced by consumers does not correspond to the official disclosure."⁵⁹ Despite these early initiatives, no formal solution was proposed until 1992, when the Council requested that the Commission contemplate the possibility of approximating guarantee arrangements and the desirability of such a measure.⁶⁰

It soon became apparent that shopping across borders would only flourish if consumers knew that they could "enjoy the same guarantee and after-sale service conditions no matter where the supplier was located."⁶¹ The problems faced by consumers centered on the confusing set of complex rights created by the various national laws of the Member States and the excessive costs incurred when attempting to assert these rights.⁶² Throughout 1992 and 1993, certain national authorities contemplated reforms to their domestic law but eventually decided to wait for discussion at the Community level before finalizing these reforms.⁶³ At this point, it was no longer a matter of *whether* measures would be introduced, but *when* and to *what extent* measures would be implemented.

One final hurdle remained in the way of implementing legislation: the principle of subsidiarity, which had long been a

⁵⁸ European Parliament Resolution on Consumer Protection and Public Health Requirements to be Taken Into Account with the Completion of the Internal Market, 1992 O.J. (C 94) at 217.

⁵⁹ Green Paper, *supra* note 3, at 11; see Opinion on Consumer Protection, *supra* note 21, at 16.

⁶⁰ See Council Resolution on Future Priorities for the Development of Consumer Protection Policy, 1992 O.J. (C 186) 1, 3. The Council also stressed the need for improved consumer representation and information. See *id.*

⁶¹ Green Paper, *supra* note 3, at 5.

⁶² See Goyens, *supra* note 36, at 86; Wilson, *supra* note 54, at 135.

⁶³ See Green Paper, *supra* note 3, at 8.

thorn in the side of attempts at consumer policy legislation.⁶⁴ Simply put, the principle of subsidiarity "creates a presumption that all powers other than exclusive competences remain vested in the Member States while the Community can exercise these powers only in limited situations."⁶⁵ Member States had attempted to use this concept to block unwanted legislation in the area of consumer protection "where no link to the aims of the Internal Market can be found."⁶⁶ Some commentators consider subsidiarity a "Loch Ness Monster"⁶⁷ that will "weaken the Community and slow down the integration process."⁶⁸ Others contend that it is "primarily a tool for effective implementation and enforcement decisions."⁶⁹ In any event, subsidiarity has caused the Commission to be hesitant in its proposals, thereby developing initiatives that are less controversial, but also less effective for the consumer.⁷⁰

In response to the principle of subsidiarity, the Commission chose to propose measures by way of directives calling for minimum harmonization of existing national laws.⁷¹ These directives are intended to "achieve greater uniformity among existing Member States laws."⁷² The directives themselves provide a legislative framework whereby the Commission declares the results that are to be achieved, but the individual Member

⁶⁴ See Evans, *supra* note 22, at 19.

⁶⁵ A.G. Toth, *The Principle of Subsidiarity in the Maastricht Treaty*, 29 COMMON MKT. L. REV. 1079, 1103 (1992).

⁶⁶ Goyens, *supra* note 35, at 379. The use of the principle has become a "defensive ploy to protect against unwanted meddling." Leigh Gibson, *Subsidiarity: The Implications for Consumer Policy*, 16 J. CONSUMER POL'Y 323, 324 (1993). The German government submitted a list of initiatives it considered violated subsidiarity that consisted of nearly every consumer protection measure under consideration. See Micklitz & Weatherill, *supra* note 22, at 307.

⁶⁷ See BEUC: *Community Consumer Policy in a State of Paralysis*, EUR. REP., Apr. 24, 1993, available in LEXIS, Nexis Library, Eurnws File.

⁶⁸ Toth, *supra* note 65, at 1105.

⁶⁹ Gibson, *supra* note 66, at 323.

⁷⁰ See HARTLEY, *supra* note 14, at 163. EC institutions establish both the need for Community action and that the measure is proportionate to that need. See Gibson, *supra* note 66, at 327.

⁷¹ See SACHA PRECHAL, *DIRECTIVES IN EUROPEAN COMMUNITY LAW 3* (1995).

⁷² Reindl, *supra* note 44, at 646.

States retain the choice over the "form and methods" to attain the specified goals.⁷³ By allowing the Member States to set their own national standards, the Commission embraced the concept of "minimum harmonization," which requires that all Member States maintain a certain level of minimal protection, but then allows the different nations the freedom to maintain or enact stricter legislation.⁷⁴ The Commission chose to take this route with its measures dealing with consumer protection.⁷⁵

While these directives should provide consumers with Community-wide protection, there are several problems that must be overcome.⁷⁶ First, directives tend to be vague and ambiguous and open to wide interpretation by the Member States during implementation.⁷⁷ Second, enforcement of directives is left to the national courts, which may result in several different interpretations of the measure.⁷⁸ Despite these problems, the directive is considered by many to be the best method of achieving minimal levels of harmonization and affording consumers Community-wide protection.⁷⁹

III. Guarantee Law Prior to the Proposal

As an initial matter, it is important to note the differences between the *legal* guarantee and the *commercial* guarantee. The Commission has defined and explained the legal guarantee as follows:

The notion of the "legal guarantee" includes all legal protection of the purchaser in respect of defects in the goods acquired, resulting directly from the law, as a

⁷³ PRECHAL, *supra* note 71, at 4. Member States have discretion to determine how to implement the Directive into their national law. See Reindl, *supra* note 44, at 649.

⁷⁴ See PRECHAL, *supra* note 71, at 4.

⁷⁵ See Reindl, *supra* note 44, at 652.

⁷⁶ See Goyens, *supra* note 35, at 382.

⁷⁷ See PRECHAL, *supra* note 71, at 36; Reindl, *supra* note 44, at 649; Goyens, *supra* note 35, at 383.

⁷⁸ See PRECHAL, *supra* note 71, at 190. This is especially troubling in cross-border situations as demonstrated by the problems dealing with misleading advertising cases. See Goyens, *supra* note 35, at 382.

⁷⁹ See Reindl, *supra* note 44, at 646.

collateral effect of the contract of sale. The key feature of the legal guarantee is that it is designed to protect purchasers' confidence in the context of the contract of sale—their legitimate expectations concerning the products purchased—and it operates independently of the will of the contracting parties, its effects being binding in law.⁸⁰

The commercial guarantee has been differentiated from the legal guarantee and defined as follows:

[T]he notion of "commercial guarantee" expresses the will of one person, the guarantor, who assumes personal liability for certain defects which may be present in the goods sold. These guarantees take the form of a written promise accompanying the product or delivered at the time of purchase to which the guarantor undertakes to repair or replace the product if a defect emerges within a certain time.⁸¹

A. Legal Guarantee Law Among the Member States

Even a cursory comparison of the legislation enacted in the various Member States regarding legal guarantees makes it obvious that consumers face a complex set of laws governing their rights against manufacturers and vendors. Although all Member States have laws that contain provisions relating to the guarantee in the event of a defect in the product sold, the variations found in these regulations make it almost impossible for a consumer to receive accurate information regarding the rights that are granted.⁸² In the majority of Member States, the ground rules for guarantees are contained within the country's Civil Code. In addition, several countries have supplemented the provisions of their Civil Codes with specific acts of legislation dealing with consumer protection.⁸³ These initiatives have taken various forms, including provisions that dictate the specifics of the legal guarantee and provisions that relate to the content of a contract and prohibit them from containing any terms that deny the consumer the benefits of the

⁸⁰ Proposal for a Directive, *supra* note 1, at 3.

⁸¹ *Id.*

⁸² See Green Paper, *supra* note 3, at 17.

⁸³ See *id.*

legal guarantee.⁸⁴ With the exception of the Italian government, Member States have overwhelmingly realized the need to "restrict contracts at will in the domain of the legal guarantee."⁸⁵ Overall, there is a more stringent approach to terms that limit the legal guarantee when dealing with consumer contracts, although some countries are equally as vigilant regarding commercial transactions.⁸⁶

The exact definition of what constitutes a "defect" in a product—the trigger that activates the guarantee—is the "cornerstone to all legal guarantee systems."⁸⁷ The variance in its meaning among the Member States is one of the main reasons for consumer confusion.⁸⁸ The basic definition of "defect," which is similar in most countries, is something that diminishes the product's value, its fitness for normal use, or the use specified by the contract.⁸⁹ However, despite this apparent overall similarity, the application of the definition is decided on a case-by-case basis among the Member States, which realistically prevents the consumer from gathering adequate information prior to making a purchase.⁹⁰ Although the notion of "defect" often refers to the quality or the use, as characterized by the agreement between the parties, there is a trend in current legislation toward an obligation based on "conformity with the information provided and the purchaser's legitimate expectations."⁹¹ Despite the latitude

⁸⁴ See *id.* at 23. For example, Germany has adopted provisions which govern the use of take-it-or-leave-it standardized contracts and their application to the legal guarantee. See *id.*

⁸⁵ *Id.* In most countries, unfair contract terms are void; however, the legal guarantees' provisions are not mandatory in all cases. Italy allows the parties to waive the rights created by the legal guarantee by express agreement in the contract. See *id.* at 21.

⁸⁶ See *id.* at 23.

⁸⁷ *Id.*

⁸⁸ See *id.*

⁸⁹ See *id.* at 28. The United Kingdom, in order to introduce a reasonable person standard, recently changed its definition of a defective product from considering "merchantable quality" to "fitness for purpose." Wilson, *supra* note 54, at 141.

⁹⁰ See *id.*

⁹¹ Green Paper, *supra* note 3, at 28. This obligation falls in line with the increased demand for more consumer information regarding products and national laws. See Opinion on Consumer Protection, *supra* note 21, at 22; First Action Plan, *supra* note 19,

afforded the parties to specify what constitutes a defect, the courts of the Member States will play an immense role in interpreting such vague concepts as "fitness for normal use," a "latent" defect, a "serious" defect, "misleading information," or "merchantable quality"—a fact which could make "well-established solutions . . . still few and far between."⁹²

A common requirement throughout the Member States is that the defect must exist prior to the transfer of property in order for the consumer to have any rights against the seller or manufacturer.⁹³ Other considerations, such as the hidden nature of a defect or the vendor's knowledge of the defect, vary widely among the national laws of the Member States.⁹⁴ Goods will not be considered defective in some of the Member States if the defect was latent,⁹⁵ the purchaser examined the goods and should have discovered the defect,⁹⁶ or the purchaser was "genuinely aware" of the defect at the time of the sale.⁹⁷ Furthermore, the vendor's knowledge or possibility of knowledge of the defect has different effects on the legal guarantee throughout the Union.⁹⁸

The second element of the legal guarantee involves determining both who is protected by the guarantee and who can be found liable in the event of a defect.⁹⁹ In the majority of Member States, the contractual nature of the guarantee dictates that the purchaser can only seek redress against the immediate

at 8.

⁹² Green Paper, *supra* note 3, at 29. Certain countries, such as Germany and Belgium, require that the defect be sufficiently severe before they will allow recovery. *See id.*

⁹³ *See id.*

⁹⁴ *See id.*

⁹⁵ *See id.* at 23-24. German law requires that the purchaser be unaware of the defect at the time of the sale in order to recover. *See id.* Belgian law states that a good is only defective if the defect was latent. *See id.*

⁹⁶ *See id.* at 25. French law states that the purchaser must not have been able to reasonably identify the defect after an elementary check. *See id.*

⁹⁷ *See id.* at 25-26. The laws of Italy and Greece state that, for a good to be considered defective, the consumer must not or could not have been aware of the defect. *See id.*

⁹⁸ *See id.* at 29.

⁹⁹ *See id.* at 29, 32.

seller of the product,¹⁰⁰ although some countries allow for further extension of liability in certain circumstances.¹⁰¹ In Member States where privity of contract is required, subsequent purchasers or non-purchaser users may not be beneficiaries of the guarantee.¹⁰² The Member States that do not require privity of contract to effectuate the guarantee allow actions by subsequent purchasers, but do not allow non-purchaser users to bring claims.¹⁰³

Another element is the effect of the guarantee regarding remedies that are available to the consumer once a product has been shown to be defective. The traditional remedies of the purchaser's right to either demand the rescission of the contract or a reduction in price are recognized in all Member States, although the conditions for exercising this right vary.¹⁰⁴ Recent legislation has granted the consumer the additional right of having the merchandise either repaired¹⁰⁵ or replaced with a non-defective product at no cost to the consumer.¹⁰⁶ Despite these alternatives, in reality the purchaser rarely has the option of choosing his remedy due to the logistic constraints inherent in any transnational purchase.¹⁰⁷ All Member States allow a purchaser the right to sue

¹⁰⁰ See *id.* at 32. Belgium, France and Luxembourg expressly do not require privity of contract. Belgium law considers the guarantee to be an "intrinsic characteristic of the product itself" that is transferred to subsequent purchasers. *Id.* Direct action against remote sellers is subject to two restrictions: (1) the defect must have been present at the time of sale by the professional; and (2) the guarantee invoked must be brought against that professional. See *id.* This last requirement is in place because a manufacturer may disclaim his liability, subject to a determination of unfairness. See *id.*

¹⁰¹ See *id.* at 29. Germany, for instance, grants the vendor the ability to transfer his rights vis-à-vis his seller to the final purchaser. See *id.*

¹⁰² See *id.* at 33. Denmark and the Netherlands are the exception to this rule and would allow a subsequent purchaser to benefit from the guarantee even though a remote manufacturer cannot be held liable by the first purchaser. See *id.*

¹⁰³ See *id.* The Netherlands is the only country that clearly confers the right to bring a guarantee action against a non-purchaser user. See *id.* The United Kingdom allows the family members of a purchaser to bring an action. See *id.*

¹⁰⁴ See *id.* at 39.

¹⁰⁵ See *id.* The right is expressly granted in Denmark, Spain, Greece, Ireland, the Netherlands, and Portugal. See *id.*

¹⁰⁶ See *id.* Germany, Denmark, Spain, Greece, Ireland, the Netherlands, and Portugal grant this right to the consumer. See *id.*

¹⁰⁷ See *id.*

for damages, incidental or consequential, in circumstances involving negligence or faulty behavior on the vendor's part.¹⁰⁸

The final consideration relating to the legal guarantee involves the guarantee period, the time limit to institute an action, and rules governing the burden of proof. In many countries it is difficult to distinguish between the guarantee period and the time frame within which to bring a claim.¹⁰⁹ Several countries simply list one time period. Among the European Community this period ranges from six months to six years.¹¹⁰ Among the Member States, the time period can start to run at the delivery of the merchandise, the conclusion of the contract, or the discovery of the defect.¹¹¹ Where the country provides for combined periods, the first time limit is for notifying the vendor and the second time limit is for instituting legal proceedings.¹¹² The length of certain periods makes proving that the defect existed at the time of the sale or delivery very difficult. However, some States have provisions that extend the time period for a purchaser to bring suit in the event of deception or bad faith on the part of the vendor.¹¹³ Another factor making it difficult to bring a suit is the fact that the majority of Member States require that the burden of proof be on the purchaser to demonstrate that the defect existed before the sale or the time of delivery, whichever its particular national laws might require.¹¹⁴

¹⁰⁸ *See id.* The United Kingdom and Ireland allow the consumer to collect damages even in the absence of any negligence on the part of the vendor. *See id.* In the other countries, providing misleading information or the vendor's awareness of the defect at the time of the sale would both give rise to a possible damage award. *See id.* Germany and Denmark have express provisions allowing damages when the product does not have the qualities promised by the vendor. *See id.*

¹⁰⁹ *See id.* at 42.

¹¹⁰ *See id.* at 40-42. While Germany allows only a six-month time period, the United Kingdom grants six years and Belgium law is silent regarding any time period. *See id.*

¹¹¹ *See id.* at 42.

¹¹² *See id.*

¹¹³ *See id.* at 40. In Denmark, the one-year limit is not valid if the vendor has not exhibited honest behavior. *See id.*

¹¹⁴ *See id.* at 43-44.

B. Commercial Guarantee Law Among Member States

The Member States have instituted very little substantive legislation regulating commercial guarantees, and, as a general rule, these few attempts have been quite timid. These initiatives have only sought to: (1) ensure correct information to the consumer regarding the legal guarantee and its mandatory nature; (2) afford specific protection with respect to durable goods; and (3) create a general framework of legal ground rules.¹¹⁵ These rules do not afford the consumer sufficient protection and ultimately create an inherently confusing system.¹¹⁶

C. Legal Guarantees at the Community Level

The Community is also ill equipped to handle the problems of product guarantees.¹¹⁷ There are some Community instruments tangentially relating to guarantees that may contribute to the development of a Community system; however, their scopes are not sufficiently broad to assist the consumer during a cross-border guarantee dispute.¹¹⁸ This problem is the direct by-product of the decision to handle the issue of guarantees at a national level—a decision which has yet to result in any substantial action by any Member States.¹¹⁹ The Commission believed that some of these instruments could be used to lay a foundation for a Directive on legal guarantees; however, without a Community instrument at the current time, these national documents are the only ones consumers can rely on.¹²⁰

1. Community-wide Directives Related to the Guarantee

The Directive concerning liability for defective products is closely linked to the law of guarantees.¹²¹ In fact, when the

¹¹⁵ See *id.* at 49.

¹¹⁶ See *id.*; see also *infra* notes 147-74 and accompanying text.

¹¹⁷ See *id.* at 53. There is no Community instrument tailored specifically for the consumer guarantee. See *id.*

¹¹⁸ See *id.* at 53.

¹¹⁹ See Young, *supra* note 2, at 36; Green Paper, *supra* note 3, at 17-52; see also *supra* notes 64-79 and accompanying text.

¹²⁰ See Green Paper, *supra* note 3, at 53.

¹²¹ See Council Directive 85/374 on Products Liability, 1985 O.J. (L 210) 29-34.

proposal for this Directive was first introduced, the Commission discussed the question of legal guarantees.¹²² After initially considering the inclusion of some provisions to deal with legal guarantees, the idea was rejected. The Commission felt that the problems could be more appropriately handled by the legal systems of the Member States.¹²³

The Directive on Unfair Terms in Consumer Contracts¹²⁴ is another example of a measure that pertains to the area of legal guarantees but comes up short in assisting consumers in their struggle against more powerful manufacturers and vendors.¹²⁵ However, this instrument is important for its declaration that any term that has the effect of "inappropriately excluding or limiting the legal rights of the consumer vis-à-vis the seller or supplier or another party in the event of total or partial non-performance or inadequate performance by the seller or supplier of any of the contractual obligations" is unfair as a matter of law and is not enforceable.¹²⁶ This provision eliminates the possibility of a vendor disclaiming liability for a legal guarantee.¹²⁷

This Directive could have had a major effect on the legal guarantee system if the Commission had not eliminated a critical section from the final draft.¹²⁸ An earlier proposal of the Directive included a measure that required the Member States to "ensure that

The Directive, however, only included one provision that related directly to legal guarantees, Article 13, which stated that the Directive did not infringe on the rights of consumers created by national legal guarantees. *See id.*

¹²² *See* Green Paper, *supra* note 3, at 53. Although both concepts consider the nonconformity of the product, product liability deals exclusively within the context of safety to the consumer. Product liability differs considerably from guarantee liability in such areas as what constitutes a defect, which parties can be held liable, and what remedies are available. *See id.*

¹²³ *See id.* at 54. Should the need arise for Community-wide action, the Commission felt that "approximating the law relating to standard form contract" would be sufficient. *Id.*

¹²⁴ Council Directive 93/13 on Unfair Terms in Consumer Contracts, 1993 O.J. (L 95) 29.

¹²⁵ *See* Green Paper, *supra* note 3, at 54.

¹²⁶ Council Directive 93/13 on Unfair Terms in Consumer Contracts, 1993 O.J. (L 95) 29, 33.

¹²⁷ *See* Green Paper, *supra* note 3, at 54.

¹²⁸ *See id.* at 54-55.

the consumer is guaranteed . . . the right to receive goods which are in conformity with the contract and are fit for the purpose for which they were sold . . . within an appropriately extensive period."¹²⁹ The section granted the consumer the choice of the four common remedies and "the right to compensation for damages sustained by him which arises [sic] out of the contract."¹³⁰ Furthermore, the buyer was afforded the right to receive payments, whether from the seller or manufacturer, for any costs incurred while attempting to enforce a manufacturer's guarantee that had been forwarded to the buyer.¹³¹ Once again, these measures were not included in the final draft; however, because many of the Member States felt that the plan was both "too limited and too ambitious," a more in-depth analysis of the area was needed.¹³²

A third Directive, which has only a minimal effect on the law of guarantees, is the Directive on Misleading Advertising.¹³³ This Directive only becomes relevant when an advertisement is found to be a guarantee and then is determined to be misleading or deceptive.¹³⁴ This Directive simply calls for the prevention of misleading advertisements and does not afford private parties any individual rights.¹³⁵ Furthermore, the Directive does not bind the advertiser to his statements or grant damages to those misled or injured by them.¹³⁶

2. *Problems with Using the Legal Guarantee Under the Current Framework*

Within the framework of the Single Market, with no Community document to guide the consumer, the law of

¹²⁹ Amended proposal for a Council Directive on Unfair Terms in Consumer Contracts, 1992 O.J. (C 73) 7, 8.

¹³⁰ *Id.* at 8.

¹³¹ *See id.* The consumer had the right to benefit from the manufacturer's guarantee for either twelve months or the normal life of the product, whichever was shorter. *See id.*

¹³² Green Paper, *supra* note 3, at 56.

¹³³ Council Directive 84/450 on Misleading Advertising, 1984 O.J. (L 250) 17.

¹³⁴ *See* Green Paper, *supra* note 3, at 56.

¹³⁵ *See id.*

¹³⁶ *See id.*

guarantees has become extremely confusing for those who participate in cross-border transactions.¹³⁷ When dealing with the legal guarantee, the first step is to determine the applicable law.¹³⁸ In order to accomplish this, a complex set of private international legal standards, established by the Rome Convention, is applied based on national contract law.¹³⁹

If the producer solicited the consumer in the consumer's country of residence and the contract was concluded there, the rules of the consumer's country govern the parties' relationship.¹⁴⁰ The law of the consumer's nation also applies if the seller arranged for the consumer to travel to the seller's country for the purpose of making the purchase.¹⁴¹ On the other hand, if the consumer goes abroad without being solicited by the seller, the law of the vendor's country controls.¹⁴² Ultimately, whether the "consumer is protected by the provisions of his state of residence depends on the mandatory nature of the national provisions relating to the legal guarantee," and in many states, legal guarantee law is not a mandatory provision.¹⁴³

According to the Commission, the "crux" of the problem concerning guarantees is the consumer's ignorance of the foreign law.¹⁴⁴ The complex set of rules in place at the Community level makes it difficult for the consumer to learn of the available rights and procedures that apply when making purchases abroad. This fact makes cross-border transactions less appealing to the consumer and hinders the internal market.¹⁴⁵ Furthermore,

¹³⁷ When a consumer purchases a good in his own country, the law of the consumer's country of residence governs the guarantee protection, unless the parties have agreed by contract to use the law of another country. *See id.* at 69. A provision declaring choice of law will only be held invalid if it conflicts with a mandatory rule of law in the consumer's country of residence. *See id.*

¹³⁸ *See id.* at 67.

¹³⁹ *See id.*

¹⁴⁰ *See id.* at 68.

¹⁴¹ *See id.* at 69.

¹⁴² *See id.* Of course, it is always possible for the parties to choose the applicable law by contract. *See id.*

¹⁴³ *Id.* at 70.

¹⁴⁴ *See id.* at 71.

¹⁴⁵ *See id.*

manufacturers are encouraged to "diversify guarantee conditions depending on the Member State."¹⁴⁶

D. Commercial Guarantees at the Community Level

Community Law, as it pertains to commercial guarantees, is even less helpful to consumers than the law dealing with legal guarantees. Producer guarantees have been regulated, for the most part, through the application of Article 85 of the Treaty of Rome, which prohibits "concerted practices which restrict competition."¹⁴⁷ According to this doctrine, producers are required to offer guarantees that are valid throughout the Community.¹⁴⁸ Competition laws demand that a producer not restrict the guarantee to goods purchased "in the framework of a given distribution network," and make it mandatory that members of the network honor the guarantee, regardless of the place of purchase.¹⁴⁹

There are several regulations that impose similar competition restrictions on the producers of goods.¹⁵⁰ However, these measures merely require "the producer who offers a guarantee to ensure that this guarantee will be honoured throughout the Community, without regulating either the existence of this guarantee, or its content, or the conditions for invoking it."¹⁵¹ A major objective of competition law is to allow the consumer to import goods privately, in the hope that the buyer will be able to receive guarantees that work in his country of residence.¹⁵² The limitations at the Community level, however, often prevent this from occurring. Competition laws impose obligations on firms, but they do not create a private right of action and they do not

¹⁴⁶ *Id.* The manufacturer can bias his guarantee against consumers who reside in States where the provisions relating to legal guarantees are not mandatory. *See id.*

¹⁴⁷ *Id.* at 60.

¹⁴⁸ *See id.* at 65.

¹⁴⁹ *Id.* at 61.

¹⁵⁰ *See* Regulation No. 123/85 on Certain Categories of Motor Vehicle Distribution and Servicing Agreements, 1985 O.J. (L 17) 1; Commission Regulation No. 4087/88 on Categories of Franchise Agreements, 1988 O.J. (L 359) 1.

¹⁵¹ Green Paper, *supra* note 3, at 65.

¹⁵² *See id.*

contribute to the harmonization of guarantee law.¹⁵³

The diversity and imprecision found in commercial guarantees, combined with the lack of any Community measures to regulate them, has created a situation far more pronounced and troublesome than that found in legal guarantees.¹⁵⁴ The concept of a defective product is uniform among commercial guarantees only to the extent that defects in workmanship or materials are generally included.¹⁵⁵ Some guarantees refer to the notion of a defective product, while others talk of a defective part. To make matters worse, these guarantees offer different coverage depending on the country of sale.¹⁵⁶ Even the definition of what constitutes a "defect" also varies widely.¹⁵⁷ Other common problems associated with commercial guarantees include the vagueness of their terms and conditions, the exclusion of liability for certain defects within the "professional's sphere of control," and exemptions which vary among both the different makes and models of a product and the countries in which they are sold.¹⁵⁸

The wording of guarantee documents often makes it impossible for the consumer to determine which particular party should honor the guarantee.¹⁵⁹ Also, few guarantees mention whether a guarantee follows a subsequent transfer of the property.¹⁶⁰ Complex conditions make it difficult for the consumer to determine exactly how to invoke the guarantee and the possible remedies available varies considerably among products and

¹⁵³ *See id.*

¹⁵⁴ *See id.* at 72.

¹⁵⁵ *See id.*

¹⁵⁶ *See id.*

¹⁵⁷ *See id.* Some examples listed by the Green Paper include defects due to normal wear and tear, defects due to external causes, incorrect installation, unauthorized repairs, minor defects, any damage occurring after purchase, and damage due to transport. *See id.*

¹⁵⁸ *See id.* at 72-73.

¹⁵⁹ *See id.* at 73. Some comical examples include, "the guarantee is granted by the importer, who gives the client the right to invoke the guarantee against any official distributor of the make," or "the manufacturer who grants the guarantee, but sometimes it is the vendor who has to be contacted." *Id.*

¹⁶⁰ *See id.* at 73. In most cases the guarantee will be restricted to the first purchaser. *See id.*

manufacturers.¹⁶¹ Few guarantees give the buyer the right to receive damages based on a defective product. Likewise, there is often great diversity among Member States as to the duration of the guarantee.¹⁶² The formal conditions required to invoke the guarantee can often be numerous and unreasonable,¹⁶³ and the failure to adhere to these rules may invalidate the guarantee.¹⁶⁴

The information provided to the consumer, if any, is rarely adequate and almost certainly never seen prior to the purchase.¹⁶⁵ There is no incentive to provide an adequate information system among manufacturers because there are no economic or punitive incentives to provide more protection to consumers.¹⁶⁶ The territorial scope of the guarantee is often not present¹⁶⁷ and guarantees are "silent as to how the consumer should in practice go about invoking the guarantee in the case of cross-border contracts."¹⁶⁸ Furthermore, no information is provided regarding the legal guarantee, resulting in few consumers realizing that a legal guarantee exists or that it provides rights and remedies separate from the commercial guarantee.¹⁶⁹

E. Summary

The absence of a general legal framework applicable to the commercial guarantee, combined with the fact that few national systems have adopted rules for commercial guarantees, has created a disastrous situation for consumers. Guarantee documents for the same product will differ depending upon the Member State and,

¹⁶¹ *See id.* at 74. The consumer may be limited to one remedy, such as repair only, or not even granted a choice due to the professional's discretion. *See id.*

¹⁶² *See id.* at 74-75.

¹⁶³ *See id.* at 75. Notably, the intervention by a third party for repairs may nullify the guarantee. Some guarantees require copies of invoices or receipts, registration of the guarantee within a specified time after purchase, or obligation of the consumer to return the product. *See id.*

¹⁶⁴ *See id.* at 76.

¹⁶⁵ *See id.* Generally there is no information provided as to the availability of spare parts or how long repairs will take. *See id.*

¹⁶⁶ *See id.*

¹⁶⁷ *See id.* at 77.

¹⁶⁸ *Id.* at 78.

¹⁶⁹ *See id.* at 76.

despite language that the guarantee is "valid throughout the common market,"¹⁷⁰ the consumer can only invoke the guarantee that applies to his country.¹⁷¹ Recognizing the danger, the Commission declared that "a consumer who shops abroad is completely unaware of what rights he will be able to rely on when he returns home—rights which, very probably, will not correspond to the text of the guarantee that comes with the product."¹⁷² Consumers dealing with cross-border transactions are left to fend for themselves when attempting to invoke a commercial guarantee. According to the United Kingdom's Office of Fair Trading, "[a]ll too often, it seems that guarantees are used merely as a marketing ploy, a source of additional revenue for the supplier, or even a means of diverting consumers' attention from their legal rights."¹⁷³ The Office concluded that manufacturers' guarantees should express confidence in the product, which will in turn instill confidence, not skepticism, in the consumer regarding the internal market and its potential benefits.¹⁷⁴ It is under this cloud that the proposal for a Directive on Consumer Goods and Associated Guarantees was introduced.

IV. Proposal for a Directive

On June 18, 1996 the Commission of European Communities unveiled the highly anticipated Proposal for a European Parliament and Council Directive on the Sale of Consumer Goods and Associated Guarantees.¹⁷⁵ Hailing it a "milestone in the completion of the internal market in the interests of consumers and healthy competition," Mrs. Bonino, the European Commissioner responsible for consumer policy, claimed that the proposal would enable consumers to take more advantage of the Single Market.¹⁷⁶

¹⁷⁰ *Id.* at 78.

¹⁷¹ *See id.* at 78-79.

¹⁷² *Id.* at 79.

¹⁷³ *Id.* (quoting the United Kingdom's Office of Fair Trading, *Consumer Guarantees*, London, 1986, at 27).

¹⁷⁴ *See id.*

¹⁷⁵ Proposal for a Directive, *supra* note 1, at 1.

¹⁷⁶ *Commission Proposes Consumer Goods Guarantee Directive*, REUTER EUR. COMMUNITY REP., June 18, 1996. For a truly Single Market to exist, Mrs. Bonino asked,

The Proposal is intended to provide the consumer with a "minimum corpus of rights throughout the European Union,"¹⁷⁷ and describes both a uniform legal guarantee and a framework for commercial guarantees.¹⁷⁸ The proposal sought to solve the problem caused by the disparity of laws in the Member States concerning the sale of consumer goods and facilitate the completion of the internal market by "preventing the artificial reconstruction of new frontiers."¹⁷⁹ The document is very precise in its application and maintains a balance between the professional and the consumer by placing obligations on both parties.¹⁸⁰

A. Essential Aspects

The first major aspect of the Proposal is its discussion on the creation of a Community-wide legal guarantee. The purpose of the guarantee being to "regulate aspects which are strictly linked to the protection of consumers when they buy goods which are not in conformity with the contract."¹⁸¹ Although it does not attempt to completely harmonize sales law, the legal guarantee will become a Community-wide minimum standard that cannot be waived under any circumstances.¹⁸² Several issues are reserved for the national laws of the Member States. These issues include those surrounding the "formation of the contracts between the parties, defects in the contract, the effects of the contract including those linked to performance or non-performance of the contract, or forms of imperfect performance other than non-conformity of the product with the contract."¹⁸³ Furthermore, the text does not

"How can we explain to these consumers that when the good purchased does not correspond to their legitimate expectations or turns out to be defective, their rights will depend entirely on the country in which the seller is located?" *Id.*

¹⁷⁷ Proposal for a Directive, *supra* note 1, at 3.

¹⁷⁸ *See id.* at 7.

¹⁷⁹ *Id.* at 17. The Directive explained that the difficulties encountered by consumers revolved around the non-conformity of the good with the contract, and felt that consumer confidence in the Single Market could best be achieved by the approximation of national laws concerning the sale of consumer goods. *See id.* at 7, 17.

¹⁸⁰ *See id.* at 18-19.

¹⁸¹ *Id.* at 6.

¹⁸² *See id.* at 6, 21.

¹⁸³ *Id.* at 6.

attempt to regulate liability for "possible direct or indirect damage" caused by the lack of conformity.¹⁸⁴

The second aspect of the proposal concerns the commercial guarantee, and certain principles are laid down concerning transparency and the relationship to the legal guarantee.¹⁸⁵ The proposal does not attempt to regulate the commercial guarantee but merely attempts to establish a foundation for its creation. For example, the conditions and procedures of the commercial guarantee, the guarantee's content, its time period and the procedures for invoking it, are left to the contracting parties.¹⁸⁶

B. Scope and Definitions

The Proposal for a Directive defines its scope as the "approximation of the laws, regulations and administrative provisions of the Member States on the sale of consumer goods and associated guarantees in order to ensure a uniform minimum level of consumer protection in the context of the internal market."¹⁸⁷ The Directive only pertains to contracts dealing with consumer goods that are concluded between professionals and consumers. Although it is not limited to new and durable goods, immovables are excluded.

The Proposal also sets uniform definitions and standards controlling the provisions of a guarantee. Article 2 of the Proposal states the principle that "consumer goods must be in conformity with the contract of sale," or they are considered defective.¹⁸⁸

Conformity with the contract can be established in two ways. First, the express terms of the contract may make it obvious

¹⁸⁴ *Id.* at 7. The issues of consequential or incidental damages were left to national laws as the Commission chose to implement only partial harmonization. *See id.* at 9.

¹⁸⁵ *See id.* at 7.

¹⁸⁶ *See id.* at 7. There remains no obligation to provide a commercial guarantee and national legislation will dictate its application. The Commission also declined to include after-sales services in the proposal, for it felt it was a "complex domain which is more adequately addressed, at the Community level, through voluntary instruments." *Id.* at 7.

¹⁸⁷ *Id.* at 17.

¹⁸⁸ *Id.* Article 1 defines a "consumer" as any natural person who is not acting for a trade, business, or profession. *See id.* "Consumer goods" are those intended for "final use or consumption," and a seller is any "natural or legal person who sells consumer goods in the course of his trade, business, or profession." *Id.*

whether or not the product is defective.¹⁸⁹ Second, goods conform to the contract if the goods either: (1) "comply with the description given by the seller and possess the quality of the goods which the seller has held out to the consumer as a sample or model";¹⁹⁰ (2) "are fit for the purposes for which goods of the same type are normally used";¹⁹¹ (3) "are fit for any particular purpose for which the consumer requires them and which he had made known to the seller at the time of conclusion of the contract, except where the circumstances show that the buyer did not rely on the seller's explanations";¹⁹² or (4) "show the quality and performance which are usual in goods of the same type which the consumer can reasonably expect given the nature of the goods and the price paid and taking into account the public statements on the specific characteristics of the goods made about them by the seller, the producer or his representative."¹⁹³ Furthermore, a lack of conformity resulting from an incorrect installation will be considered a "defect" where the installation was done "by the seller or under his responsibility."¹⁹⁴

C. Obligation of the Seller

The obligations of the seller are outlined in Article 3 of the proposal. The seller is liable to the consumer for any defect that exists at the time of delivery and becomes apparent within two years.¹⁹⁵ The Proposal includes a presumption that the defect existed at the time of delivery if it becomes manifest within six months, unless it is "incompatible with the nature of the goods or the nature of the lack of conformity."¹⁹⁶ In all other circumstances, the consumer will be required to prove that the non-conformity of

¹⁸⁹ See *id.* at 17.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.* at 18.

¹⁹⁴ *Id.*

¹⁹⁵ See *id.* The Commission considered this principle to be quite common to different national legal traditions. See *id.* at 10.

¹⁹⁶ *Id.*

the good with the contract existed at the time of delivery.¹⁹⁷ However, the seller will not be liable if the "consumer knew or could not be unaware of the lack of conformity," at the conclusion of the contract.¹⁹⁸ Also, the seller is not liable for a product that fails to conform to public statements made by its producer (or his representative) if the seller can prove either (1) "he did not know or could not know about the statement in question,"¹⁹⁹ (2) "at the time of sale he corrected the statement,"²⁰⁰ or (3) "the decision to buy the goods could not have been influenced by the statement."²⁰¹

After notifying the seller of the non-conformity, the consumer is entitled to demand that either the seller repair or replace the goods.²⁰² If the vendor does not comply with this demand, then the buyer is entitled to an appropriate price reduction or rescission of the contract.²⁰³ The right to rescission or replacement of the goods is subject to a limitations period to be determined by national legislation.²⁰⁴ Also, Member States are granted the discretion to limit the rights of the consumer in the case of a "minor" lack of conformity.²⁰⁵ Finally, if the vendor is held liable for a defect resulting from an act or omission made by the producer, the vendor is entitled to "pursue remedies against the responsible

¹⁹⁷ See *id.* The consumer has one month from the date that the lack of conformity was detected or should have been detected to initiate action. See *id.*

¹⁹⁸ *Id.* at 18.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² See *id.*

²⁰³ See *id.* The Commission noted that although traditional systems tend to allow only reimbursement or reduction of the price, adding the other remedies "would certainly help bring the law more into line with economic realities." *Id.* at 13.

²⁰⁴ See *id.* at 18. The original draft of the Proposal had set a one-year limitations period for demanding a reduction in price or rescission of the contract. See *Outcome of Proceedings*, Working Party on Consumer Affairs, File no. 96/0161 (COD) (July 28, 1997) (highlighting changes made to the original Proposal).

²⁰⁵ See Proposal for a Directive, *supra* note 1, at 18. According to the proposal, the "differentiated solution is based on the idea that rescission and replacement are remedies which, as time passes, become increasingly inappropriate as the period of use grows longer." *Id.* It is also a compromise to accommodate the traditional common laws that have long guarantee periods, but only a short time to invoke replacement or refunds. See *id.* at 13.

person, under the conditions laid down by national law.”²⁰⁶

D. Obligations of the Consumer

The consumer is required to take “normal care” in examining the goods upon delivery, but a “strict obligation to carry out a detailed inspection of the good or to conduct tests to evaluate its functioning or performance is not required.”²⁰⁷ The consumer then has to notify the seller of any nonconformity within a time period to be determined by the Member States, but which cannot be less than one month, of either its actual detection or when the nonconformity normally ought to have been detected.²⁰⁸ Once the seller is notified, the two-year limitation period in which to institute an action is frozen.²⁰⁹

E. Commercial Guarantee

Article 5 deals with the creation of a framework to provide consumers with commercial guarantees. While the commercial guarantee remains a voluntary option of the professional, any commercial guarantee offered must place the consumer in a more advantageous position than that created by the legal guarantee.²¹⁰ The guarantor is legally bound by the terms of the guarantee document.²¹¹ In addition, the Proposal directly asserts that advertising will form the basis of a guarantee as if it were included in the contract.²¹² With the exception of advertising, the

²⁰⁶ *Id.* at 18. The Commission included this provision to avoid any injustice suffered on the part of the seller who must bear the cost of a manufacturing defect. *See id.* at 14.

²⁰⁷ *Id.* at 12.

²⁰⁸ *See id.* at 19. The obligation on the buyer was intended to encourage diligence and take into account the interests of the seller. *See id.* at 12. When the consumer “should have” discovered a defect is determined by the national law of the consumer’s country. *See id.*

²⁰⁹ *See id.* at 19. A lack of tolling of the period would force consumers to bring legal actions to avoid forfeiting their rights. *See id.* at 12.

²¹⁰ *See id.* at 19.

²¹¹ *See id.*

²¹² *See id.* Advertising is considered by the Commission as an integral part of the guarantee because the “consumer’s confidence and expectations are built up” by it. *Id.* at 12.

commercial guarantee must be in writing and must include certain particulars necessary to allow the consumer to invoke its remedies.²¹³ Furthermore, the consumer has an absolute right to demand the guarantee document prior to the purchase of the goods, and the consumer must be informed that the rights it contains cannot be waived.²¹⁴

F. Justification

The overall goal of the proposed Directive is to “improve the functioning of the Single Market and to reduce the distortions to competition which may be caused by differences in legislations” among the Member States.²¹⁵ Specifically, the benefits enumerated include strengthening consumer confidence, facilitating cross-border purchases, simplifying existing national rules, bringing Community law closer to the European citizens through direct and tangible benefits, and having “positive effects on competition, business competitiveness and the European economy.”²¹⁶ The Proposal reasons that independent action by the Member States in this area could provide “neither a minimum standard of protection for consumers throughout the Union nor adequate protection of consumers in the context of cross-border transactions.”²¹⁷ Due to the concept of partial harmonization, Member States “will be free to adopt or maintain in force more stringent rules” in the area of consumer protection.²¹⁸ However, the Member States must adhere to the minimum levels of protection established in the Proposal within two years after its publication in the Official Journal of the European Communities.²¹⁹

²¹³ See *id.* at 19. The duration and territorial scope of the guarantee, as well as the name and address of the guarantor, are required. See *id.*

²¹⁴ See *id.* at 13.

²¹⁵ *Id.* at 8.

²¹⁶ *Id.*

²¹⁷ *Id.* at 9.

²¹⁸ *Id.* at 9, 22.

²¹⁹ See *id.* This provision is in line with the principle of subsidiarity. See *supra* notes 64-79 and accompanying text.

V. Analysis of The Proposal

Now that the Commission has presented its Proposal for a Directive on consumer goods and associated guarantees, it is necessary to dissect this document to determine whether it achieves its stated goals.

A. Goals of the Documents

In its Green Paper, the Commission declared that "the large economic space without frontiers will not be completely realized unless, in conjunction with the free movement of products and services, the free movement of consumers can be secured as purchasers of goods and recipients of services."²²⁰ The goal of any measure must be to instill confidence in the consumers and to encourage them to take an active part in the internal market.²²¹ In order for that to occur, the Commission felt it was necessary to create conditions where "the consumers can rest assured as to their rights and know they can definitely rely on them throughout the single market."²²²

B. Comparison of the Documents

1. Framework for Solutions

A comparison of the possible solutions set forth in the Green Paper and the text of the Proposal for a Directive is useful to determine whether the consumer will benefit from a Community-wide Directive. The Green Paper presented solid proposals to rectify the growing concern over consumer guarantees. The document did not intend for its enumerated proposals to be binding. Rather, the proposals should be viewed as "merely a way of indicating a number of avenues or pathways that should trigger public discussions designed to generate new insights."²²³ The possible solutions were geared toward "adopting a common

²²⁰ Green Paper, *supra* note 3, at 9.

²²¹ *See id.*

²²² *Id.*

²²³ *Id.* at 81.

approach to the guarantees offered to the consumer” and preventing the consumer from being “treated differently depending on the country in which he purchases or uses a product, depending on whether he has to travel or not, etc.”²²⁴

Both the Proposal and the Green Paper adopted this common approach through the partial harmonization of the national laws currently in place.²²⁵ While the Green Paper limited its scope to movable goods that are durable and new, the authors of the Proposal felt such a restriction was unwise and eliminated that exclusion.²²⁶ Although the framework for the two solutions was similar, the effect on consumers could vary greatly.

²²⁴ *Id.* In addition, a common approach would be beneficial to the business community, who could now “market their products everywhere in the community on the basis of similar rules.” *Id.*

²²⁵ *See* Green Paper, *supra* note 3, at 83; Proposal for a Directive, *supra* note 1, at 8. In the Green Paper, two possible avenues were suggested to implement the concept of a Community-wide legal guarantee, either adoption of the applicable rules of private international law or harmonization. *See* Green Paper, *supra* note 3, at 82. Essentially, the first plan dictated that the consumer would always “be protected by the law of his country of residence.” *Id.* There were numerous problems with that suggestion and the Commission did not believe it was a viable one. *See id.* First, it could lead to confusion for vendors who would have to deal with differing national systems. *See id.* at 82. Second, it would accomplish nothing in the area of eliminating the divergence among the national systems. *See id.* Third, it would create a distortion in competition among vendors and manufacturers. *See id.* Finally, it would lead to discrimination against consumers with less protective laws. *See id.* The harmonization solution proposed by the Commission had two separate alternatives. *See id.* at 83. The first called for general harmonization, which would permit common rules concerning the legal guarantee, regardless of the product in question and the status of the contracting parties. *See id.* This possibility was declared a “cumbersome and inflexible solution, ill-fitted to the objectives pursued.” *Id.* Rather than a general harmonization, the document focused on consumer protection and designed a plan around that goal. The Commission recommended that the legal guarantee be based on “consumer goods” rather than the status of the parties as consumer or professional. *See id.* at 83-84. Such an outlook would be in line with the modern understanding that a guarantee is attributable to the product itself and not the party purchasing it. *See id.*

²²⁶ *See* Proposal for a Directive, *supra* note 1, at 10. The Commission stated that most of the replies to the restriction were negative. In the European Parliament’s opinion on the Green Paper, the restriction was called “regrettable since consumers’ problems in cross-border shopping are more broadly based.” Resolution on the Commission Green Paper on Guarantees for Consumer Goods and After-Sales Services, 1994 O.J. (C 205) at 563 [hereinafter Opinion on the Green Paper].

2. Definition of "Defect"

While the concept of exactly what constitutes a "defect" is the foundation to any guarantee scheme, the two documents applied different standards. The Green Paper defined "defect" as a "failure to meet the consumer's legitimate expectations."²²⁷ It claimed to be a good synthesis of current law in the Member States in that it took into consideration the notions of "latent defect," "manifest defect," or "known defect," for which there could be no failure to conform.²²⁸ It also took into account any special technical knowledge of the product a purchaser may have had.²²⁹ In order to determine the parties' "legitimate expectations," a court would be required to consider all the relevant circumstances, including "the provisions of the contract, the presentation of the product, the price, the brand, the advertising or any information provided on the product, the nature of the product, its purpose, the laws and regulations concerning the product and other features."²³⁰

The Proposal, on the other hand, chose to define defect as "nonconformity with the contract."²³¹ The Commission declared that this was a common definition among the Member States and "enshrined by the Vienna Convention of 1980 on the international sale of goods between professionals."²³² This change appears to be a step backwards for the consumer. While the "legitimate expectations" standard in the Green Paper takes into account a wide range of circumstances, the "conformity with the contract" definition is essentially limited to the terms of the contract, any statements or representations made about the product, and the normal use of the product.²³³ Such a provision would allow the

²²⁷ Green Paper, *supra* note 3, at 85.

²²⁸ *See id.* at 86. Those concepts would be out of the scope of a defect since any expectation on the part of the consumer would have to include the known defect. The Commission also felt the standard allowed for an assessment of the defect with respect to the party liable and enabled "one to consider differences in the types of defects with a view to determining the purchaser's rights." *Id.*

²²⁹ *See id.*

²³⁰ *Id.* It was an objective criterion that the document called "dynamic." *Id.*

²³¹ Proposal for a Directive, *supra* note 1, at 9.

²³² *Id.* at 9.

²³³ *Id.* at 17-18.

vendor to limit the terms of the contract in its favor, as long as the terms are not considered unfair.

3. *Parties Affected*

Another area where the Proposal differed from the Green Paper involves its determination of which parties are liable under, and who can be considered a beneficiary of, the guarantee. The Green Paper stressed its belief that the consumer had more faith in the manufacturer than in the seller. "When a product's defect results from its manufacture, it is illogical that the vendor, who has no influence on the production process and who in many cases may not even have packed the product should be the only person to whom the purchaser can turn."²³⁴ It went on to state that it was "counter-intuitive" to hold a producer liable when the defective product caused injury to either an individual or other goods, while still allowing the producer to disclaim any liability where the "product fails to work."²³⁵

Ultimately, the Green Paper called for joint liability between the manufacturer and the vendor.²³⁶ The defect could only be attributed to the manufacturer with regard to features of the product for which the particular manufacturer was responsible; and, in addition, the purchaser's rights vis-à-vis the manufacturer did not include either repudiation of the sale or reduction in price.²³⁷ As to the beneficiary of the guarantee, the Commission felt that the initial purchaser and any subsequent owner of the product should be covered, provided that proof of the initial purchase could be furnished.²³⁸

In contrast, the final draft of the Proposal for a Directive failed to protect the consumer in two key respects. First, it made the

²³⁴ Green Paper, *supra* note 3, at 86-87.

²³⁵ *Id.* at 87. Holding the manufacturer liable would also create a greater chance of consumer compensation, because the manufacturer would have greater financial resources than the retailer. *See id.*

²³⁶ *See id.*

²³⁷ *See id.* at 87-88. The first limitation avoided the possibility of a manufacturer's liability for a statement made by the vendor. The second limitation is to prevent the manufacturer from having to bear the cost of any mark-up in price attributable to the product by the vendor. *See id.*

²³⁸ *See id.* at 88.

regrettable decision to limit liability to the final seller of a product.²³⁹ In its opinion on the Green Paper, the European Parliament called on the Commission to base its ultimate proposal on the "joint liability of manufacturer and vendor in respect of the legal guarantee."²⁴⁰ The document stated that because guarantees "play an important part in the marketing of goods and in the competition between manufacturers on quality and service," it is prudent to hold the manufacturer jointly liable with the vendor.²⁴¹

The Commission chose to ignore these comments and maintain the status quo in this area, which did *not* favor joint liability for the manufacturer and vendor.²⁴² As a result of this decision, the consumer continues to face the difficulties associated with

²³⁹ Article 3 does provide a remedy for the final seller to pursue against the manufacturer, in the event that the product defect is the result of the manufacturer; however, this provision is not mandatory. See Proposal for a Directive, *supra* note 1, at 18. National laws would control any action on the part of the final seller against the manufacturer. See *id.* If permissible under national law, a producer with sufficient economic power could exclude such liability in the contract with the final seller. See Reindl, *supra* note 44, at 671.

²⁴⁰ Opinion on the Green Paper, *supra* note 226, at 564. The Green Paper included a Department of Trade and Industry document from the United Kingdom that discussed the growing trend of manufacturer liability for the quality of their products. See Green Paper, *supra* note 3, at Annex V.

²⁴¹ See Opinion on the Green Paper, *supra* note 226, at 564. The Green Paper made this assertion based on the reasoning that because the manufacturer controls the quality of the goods, it is probably in a better position than the vendor to provide repairs or replacement. See *id.* Under this approach, holding the manufacturer liable would ensure that consumers would receive what they had been promised, thereby increasing consumer confidence in the Common Market. See *id.* The hurdles of privity, offer and acceptance, and consideration would all be cleared in any attempt to hold the manufacturer liable. See *id.* The European Consumer Law Group expressed its belief that "[t]he principle of privity of contract is a major obstacle to the real and effective implementation of consumer rights in the case of defective goods." *European Consumer Law Group: The EU Green Paper on Guarantees for Consumer Goods and After-Sales Services—A Response*, 17 J. CONSUMER POL'Y 363, 365 (1994) [hereinafter *Response to EU Green Paper on Guarantees*]. The Green Paper contained the opinion that the increased consumer confidence would offset any costs to industry that arose from the manufacturers' increased liability to consumers for the quality of their products. See Green Paper, *supra* note 3, at Annex V. In a related note, the United Kingdom recently declined to implement manufacturer liability into consumer protection for defective products despite support from both consumers and producers. See Wilson, *supra* note 54, at 142.

²⁴² See Proposal for a Directive, *supra* note 1, at 18.

asserting rights against sellers in cross-border transactions. Even if the manufacturer is ultimately found liable to the final seller, the excessive cost of having to litigate this extra step will be wasteful to both parties.

The second key area where the Proposal failed to protect the consumer is that it declined to allow subsequent purchasers of a product to benefit from any of the rights contained in the guarantee. This limited approach is contrary to the theory that the guarantee is associated with the product and not the party.²⁴³ It is hard to imagine how these diluted provisions will "strengthen consumer confidence" or "facilitate cross-border shopping," two of the alleged goals of the Proposal.²⁴⁴

4. Remedies Available

The Proposal did take a fairly strong approach to the effects of the guarantee. The four remedies granted are the only ones usually considered in a guarantee claim among the Member States and also coincide with the solutions expressed in the Green Paper.²⁴⁵ The final draft of the Proposal eliminated the possible option of allowing the vendor to propose an alternate remedy in certain situations. However, it did grant Member States the right to restrict remedies in the event of a "minor" defect and limited the availability of rescission or replacement of the good to one year from the time of purchase.²⁴⁶ Member States were left to determine whether damages, both direct and indirect, would be available to the consumer.²⁴⁷ This may create a discrepancy among

²⁴³ See Green Paper, *supra* note 3, at 88. The European Parliament requested that the Directive allow the "legal transfer of rights to the person entitled to invoke the guarantee." Opinion on the Green Paper, *supra* note 226, at 564.

²⁴⁴ Proposal for a Directive, *supra* note 1, at 7. The European Consumer Law Group felt that guarantees should benefit anyone using the product, not merely the original purchaser. See *Response to EU Green Paper on Guarantees*, *supra* note 241, at 365.

²⁴⁵ See Proposal for a Directive, *supra* note 1, at 18.

²⁴⁶ See *id.* at 8. The Commission felt these provisions were an adequate compromise between the widely differing laws found among the Member States. See *id.* A survey of British citizens showed that 87% desired replacement of the good or refund of purchase price in the event of a defective good. See Wilson, *supra* note 51, at 136.

²⁴⁷ See Proposal for a Directive, *supra* note 1, at 9.

the Member States because only a handful of countries currently provide for this remedy.²⁴⁸ Despite these concessions to the national laws of the Member States, the Proposal does an adequate job of establishing a minimum standard of rights for the consumer, something that was obviously missing in the past.

5. *Conditions That Trigger the Legal Guarantee*

The conditions for applying the legal guarantee are also pro-consumer. As suggested in the Green Paper, the Proposal's text abandoned any requirement concerning the vendor's knowledge or ignorance of the defect.²⁴⁹ As is customary among the majority of Member States, the Proposal stated that the vendor is responsible only for defects existing at the time of delivery.²⁵⁰ However, the provision then went further by creating a presumption that a product was defective if the defect manifested itself within six months of delivery.²⁵¹ This presumption reverses the burden of proof, which is usually governed by national law, in favor of the consumer.²⁵² While the Green Paper required no special procedure or formality regarding notification to the potentially liable entity, the Proposal requires notification to the seller within one month of when the defect was discovered or reasonably should have been discovered.²⁵³ The Proposal's choice of a two-year time period in which to discover the defect is quite reasonable considering the wide range of time-periods found at the various national levels.²⁵⁴ The tolling of the limitation period once the seller is notified allows the consumer the opportunity to have the matter resolved between the parties without requiring that a formal action be

²⁴⁸ See *supra* notes 82-114 and accompanying text.

²⁴⁹ See Green Paper, *supra* note 3, at 91. The document suggested that the vendor should not be able to oppose the consumer's choice of remedy if the vendor had knowledge of the defect and acted in bad faith. See *id.*

²⁵⁰ See Proposal for a Directive, *supra* note 1, at 10.

²⁵¹ See *id.*

²⁵² See *id.*

²⁵³ See *id.* at 15. The requirement of notification is present in the laws of several Member States and the Commission felt it created a balance between the seller and consumer. See *id.* at 12.

²⁵⁴ See *id.* at 13.

brought.²⁵⁵

6. *Relationship to the Commercial Guarantee*

The final aspect of the legal guarantee is its relationship to the commercial guarantee. Both the Proposal and the Green Paper demand that the legal guarantee be a mandatory right of the consumer that cannot be waived or disclaimed in any manner.²⁵⁶ Also, both documents include the requirement that the commercial guarantee provide the consumer with adequate information regarding the legal guarantee.²⁵⁷ Furthermore, the consumer maintains the right to demand the simultaneous application of both the legal guarantee and the commercial guarantee in order to assure full compensation for any loss.²⁵⁸ The solutions offered in the Proposal and the Green Paper state that advertising should be considered a guarantee and that the consumer must be allowed to view the guarantee prior to purchase.²⁵⁹ Finally, the consumer has the right to invoke the legal guarantee when the commercial guarantee proves ineffective or insufficient.²⁶⁰

Despite these similarities, the differences between the documents are actually quite significant. To begin with, the Proposal's position on the commercial guarantee does not provide consumers with sufficient protection and is a far cry from the solutions set forth in the Green Paper. The Green Paper proposed a mandatory legal framework applicable to all commercial guarantees and an optional "European Guarantee," subject to certain supplementary rules on uniformity and applicability throughout the Community.²⁶¹ Although the guarantee would still

²⁵⁵ See *id.* at 12.

²⁵⁶ See *id.* at 16; Green Paper, *supra* note 3, at 93.

²⁵⁷ See Proposal for a Directive, *supra* note 1, at 12.

²⁵⁸ See Proposal for a Directive, *supra* note 1, at 13. The Green Paper had suggested that the commercial guarantee could grant the consumer the repair of the product while the legal guarantee would compensate for any damages. See Green Paper, *supra* note 3, at 92.

²⁵⁹ See Proposal for a Directive, *supra* note 1, at 12; Green Paper, *supra* note 3, at 98.

²⁶⁰ See Proposal for a Directive, *supra* note 1, at 13.

²⁶¹ See Green Paper, *supra* note 3, at 94-95. Options not chosen include the regulatory and unitary option where the decision to offer or refuse a guarantee would

be optional, the scheme would ensure "adequate information to the consumer and the necessary market transparency with a view to encouraging healthy competition based on good commercial practices."²⁶² The framework was based on three principles establishing: (1) "certain mandatory rules concerning the legal status of guarantees . . . [including] certain elements which should be present in the guarantee document"; (2) "supplementary rules concerning the concrete guarantee scheme applicable in the event of gaps in the commercial documents"; and (3) a "principle in accordance with which advertising concerning the guarantee is considered as being part of the guarantee documents, making advertiser directly liable vis-à-vis the individual consumer."²⁶³

Under the Green Paper, the commercial guarantee would be considered a contractual relationship between the guarantor and the holder of goods, even without a direct relationship between the parties.²⁶⁴ This method would allow a cause of action against the manufacturer when the manufacturer offered the guarantee and the consumer had already pursued other channels without success.²⁶⁵ The subject matter and duration would still be at the discretion of the provider; however, standards would be implied if not specified.²⁶⁶ Furthermore, any commercial guarantee would entitle the consumer to either the repair or replacement of the defective good.²⁶⁷ As stated above, there would be joint and several liability between the vendor and manufacturer within the same distribution network set up by the same manufacturer; and the beneficiary would be any person in possession of the guarantee document who

remain entirely subordinate to the principle of freedom of contract. Such an approach assumes that the guarantees offered by producers are valid throughout the common market and subject to uniform conditions. *See id.* It would be difficult for smaller firms to guarantee after-sales service throughout the common market. The voluntary option would call for no mandatory legal status for commercial guarantees. *See id.* at 94.

²⁶² *Id.* at 95.

²⁶³ *Id.* at 96.

²⁶⁴ *See id.*

²⁶⁵ *See id.*

²⁶⁶ *See id.* at 97. For example, if the scope of the defect was not mentioned, the guarantee should cover any defect which could arise after delivery, unless it was the user's fault. *See id.* In the event no period was specified, it should cover one year after delivery to the final purchaser. *See id.*

²⁶⁷ *See id.* at 97.

is able to furnish evidence of initial purchase.²⁶⁸ Finally, two conditions would be imposed on economic operators if they wanted their commercial guarantees to be considered as a "European Guarantee": (1) "standard guarantee conditions in all Member States for the same type of goods of the same brand,"²⁶⁹ and (2) "the real possibility of implementing the guarantee in all Member States, no matter where the goods were purchased."²⁷⁰

Despite the glaring need for measures dealing with commercial guarantees, the Commission backed away from many of its earlier positions and left commercial guarantee regulation predominantly to the Member States. The Proposal merely requires that the commercial guarantee provide adequate information regarding the legal guarantee and the procedures for invoking its remedies.²⁷¹ The European Parliament had requested that the substance of the commercial guarantee be regulated and suggested the creation of "a trademark or registered trade name, indicating the European nature of this guarantee."²⁷² In addition, the European Consumer Law Group had requested a mandatory legal framework for commercial guarantees that would require that the guarantee offer the same standards in all Member States, allow for implementation in the Member State of purchase, and grant a price reduction in the event the guarantee could not be honored in the consumer's Member State.²⁷³ Neither of these recommendations were followed and the current state of commercial guarantees remains quite muddled.

Under the Proposal's guidelines, the commercial guarantee must provide more protection than the legal guarantee; however, whether or not consumers are adequately informed of this fact is

²⁶⁸ See *id.*

²⁶⁹ *Id.* at 99.

²⁷⁰ *Id.* It would be sufficient for the professional to give the consumer Community-wide access to any system which would allow the consumer to invoke the guarantee, including the return of the defective product to the producer at the producer's expense. The product must contain the label with "Euro-Guarantee," as well as no similar logos which could lead to confusion. See *id.*

²⁷¹ See Proposal for a Directive, *supra* note 1, at 13.

²⁷² Opinion on the Green Paper, *supra* note 226, at 564.

²⁷³ See Response to EU Green Paper on Guarantees, *supra* note 233, at 366.

delegated to the individual Member States, who have failed in this area in the past. Furthermore, due to the many variations in the laws of the Member States, a consumer may not be able to invoke a commercial guarantee after the legal guarantee has expired. Consumers engaging in cross-border transactions are not likely to feel any more confident with the commercial guarantee because of the continued uncertainty of the law and the difficulty of dealing with another country's legal system.

C. Recent Developments and Reaction

Although the Proposal for a Directive was drafted over one year ago, a great deal of work appears to be necessary before it will be adopted by the European Community. In June 1997, the Amsterdam European Council adopted a Single Market Action Plan that outlined the necessary political commitment toward completion of the Single Market by January 1, 1999.²⁷⁴ According to the Plan, the Proposal for a Directive is in the third phase of a three-phase approach, where "work is less advanced or where progress is likely to prove more difficult."²⁷⁵ Where proposals are already in existence, such as is the case here, the Plan calls for the "considerable investment of time and effort by the Community institutions" if adoption is to be accomplished by January 1, 1999.²⁷⁶

Since its publication, the Proposal for a Directive has been met with great resistance and criticism by industry groups throughout the European Community.²⁷⁷ The Confederation of Information Technology Trade Association (CITTA), which represents over 1,500 United Kingdom companies, believes that the costs of implementing the Proposal will be too high and that the consumer will end up paying in the form of increased prices and reduced

²⁷⁴ See *Commission Adopts Single Market Action Plan for Amsterdam European Council*, RAPID, June 4, 1997, available in LEXIS, Nexis Library, Eurnws File.

²⁷⁵ *Id.*

²⁷⁶ *Id.*

²⁷⁷ See *Personal Computer Association, Euro Commission to Conduct Secret Investigation into Consumer Guarantees*, M2 PRESSWIRE, May 21, 1997, available in LEXIS, Nexis Library, Eurnws File [hereinafter *Secret Investigation*].

choices.²⁷⁸ Predictably, the CITTA insists that the Proposal goes “way beyond what is necessary and will end up stifling both national and international trade and competition, to the detriment of the consumer.”²⁷⁹

Numerous other groups have also voiced disapproval of the Proposal. The Federation of Small Businesses claims that vendors will no longer be selling goods, “but merely hiring them out on approval for a period of one year.”²⁸⁰ The British Retail Consortium (BRC) and the Confederation of British Industry (CBI) believe that up to 10,000 jobs in certain industries may be in jeopardy.²⁸¹ Finally, the motor industry “could foresee, should the Directive be enacted as drafted, a consumer buying only one car in their life and claiming a new replacement every year.”²⁸²

These various industry groups have conducted research studies to support their position, with the CBI and BRC announcing that a two percent increase in consumer prices can be expected across the board.²⁸³ The Personal Computer Association (PCA) calls the Proposal for a Directive a “damaging, costly and unwanted piece of bureaucratic nonsense.”²⁸⁴ According to the PCA, the estimated cost to the personal computer industry will be a fifty percent increase in prices.²⁸⁵ In response to these accusations, the European

²⁷⁸ See *Proposed Consumer Directive Criticised by IT Trade Group*, M2 PRESSWIRE, Jan. 8, 1997, available in LEXIS, Nexis Library, Eurnws File [hereinafter *Directive Criticised*].

²⁷⁹ *Secret Investigation*, *supra* note 277. The CITTA attributes language problems and distance as the realistic barriers to cross-border transactions, not difficulties in implementing consumer guarantees. See *id.*

²⁸⁰ *Id.*

²⁸¹ See *id.*

²⁸² *House of Lords Rejects Brussels' Consumer Guarantee Proposals*, M2 PRESSWIRE, Mar. 20, 1997, available in LEXIS, Nexis Library, Eurnws File.

²⁸³ See *Secret Investigation*, *supra* note 277. The Department of Trade and Industry's cost assessment indicated that there would be “non-recurring costs [in the United Kingdom] of about \$30 million, with annual cost to industry thereafter of \$775 million.” *Id.*

²⁸⁴ *Id.*

²⁸⁵ See *id.* This increase can be attributed to the fact that the personal computer industry is in its early stages of evolution. According to PCA Executive Director, Keith Warburton,

[e]very knowledgeable user realizes that the PC is still, basically, an unstable

Commission decided to conduct its own study into the cost and impact of the Proposed Directive.²⁸⁶ However, this study will be conducted in secret, which has further drawn the outrage and criticism of industry groups.²⁸⁷

It appears that the industry trade groups once again are attempting to exert their considerable clout to eliminate or, at the very least, water down a consumer protection directive. With over a year left before the Proposal appears ready for adoption, it is imperative that consumer organizations voice their support for the Directive, lest the Community institutions be left to fend for themselves. Judging by the hostile reaction to the Proposal, the Directive must be accomplishing some good for the consumer. It is now up to the European Commission to stand up to the industry groups and refrain from caving in to the immense pressure.

VI. Conclusion

For over fifteen years, various European institutions discussed and debated the issue of consumer guarantees. The Single Market was intended to increase consumer confidence in the integration of the EC while opening new doors for cross-border transactions. However, in order to accomplish these goals, the free movement of goods had to be followed by the free movement of consumers. Unfortunately, during this time period, consumers were frustrated in their efforts to purchase freely throughout the Community by a puzzling set of laws that made the guarantees they received with the goods almost worthless. The problems often faced by consumers were readily apparent, yet the necessary measures to alleviate them never adequately materialized. While politicians argued and business interests lobbied, consumers were left behind.

As a result of this problem, the Commission announced the Proposal for a Directive on the sale of consumer goods and associated guarantees. Consumers are now guaranteed a minimum

technology The directive means that in the future the resolution of such problems will not be down to user familiarisation or education, or supplier goodwill, but will become a legal obligation. Which is fine, so long as the consumer doesn't mind paying for this possibility in his purchase price.

Directive Criticised, supra note 278.

²⁸⁶ *See id.*

²⁸⁷ *See id.*

set of rights that cannot be taken away from them and cross-border transactions that are made more appealing by a governing set of uniform rules. Even so, while there is no question that consumers are in a better position than they were prior to the Proposal, more could have been accomplished by this document.

Instead of setting definite Community-wide rules, the Commission chose to deal with the matter through the partial harmonization of legal guarantee law. Member States' laws still control some of the applications of the legal guarantee. Consumers, however, need to be informed of this fact so they can better protect their rights. Further, despite the trend towards eliminating the need for privity of contract, manufacturer liability was avoided in the document. Finally, the commercial guarantee was not regulated to the extent necessary to ensure the consumer greater protection against defective products.

From a legal standpoint, the Proposal has expanded consumer rights. The remaining task is to inform consumers of these rights and to ensure that they are upheld. Much of this responsibility falls on the shoulders of the Member States. The Proposal did simplify existing national rules, which may facilitate cross-border shopping. Whether it increases the confidence of consumers enough for them to take full advantage of the internal market, however, remains to be seen.

GEORGE T. BRADY

